No. 10675

In the United States Circuit Court of Appeals for the Ninth Circuit

OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, A CORPORATION, AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

Cases:

585403—44

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OPINION BELOW

The district court wrote no opinion.

JURISDICTION

This suit was brought by the United States on behalf of the Shoshone and Bannock Tribes of Indians under authority of the Act of September 1, 1888, 25 Stat. 452, to recover damages accruing by reason of the killing or maiming of certain Indians in the operation of the defendant's railroad within the Fort Hall Indian Reservation in Idaho, and the jurisdiction of the district court was invoked under section 14 of

that act (R. 3). Judgment in favor of the United States was entered on October 20, 1943 (R. 77–78). Notice of appeal was filed on January 3, 1944 (R. 83–84). The jurisdiction of this Court rests on section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the Act of September 1, 1888, imposes absolute liability upon the railroad for damages accruing by reason of the killing or maiming of Indians in the course of the operation of the railroad.
2. Whether the evidence supports a finding that the acts of the Indians were not the proximate cause of the collision.
3. Whether the court erred in admitting evidence as to the funeral expenses.
4. Whether the evidence is sufficient to support the verdicts for the deaths of Ninip and Helen Toane.

STATUTE INVOLVED

Section 14 of the Act of September 1, 1888, 25 Stat. 452, is set forth in the statement at pages 3–4, *infra.*

STATEMENT

The Fort Hall Indian Reservation was established for the Shoshone and Bannock Tribes by the Treaty of July 3, 1868, 15 Stat. 673, which in part provided that no persons, except those designated, were ever to be permitted to pass over the reservation. Neither the Oregon Short Line Railroad Company nor its

predecessor, the Utah and Northern Railway Company, was one of the persons authorized to go upon the reservation (R. 4–5). Nevertheless, the Utah and Northern Railway Company, without any right to do so, constructed a railroad across the reservation (R. 52). To relieve the situation, the United States entered into a supplemental agreement with the Indians for the granting of a right of way to the company (R. 52–53). This agreement was incorporated into the Act of September 1, 1888, 25 Stat. 452. It was provided in section 14 of the Act:

> That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States: *Provided,* That all moneys so recovered by the United States attorney under the provisions of this section shall be covered into the Treasury of the United States, to be placed to the credit of the particu-

> lar Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

The appellants, Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company of St. Paul, executed the required bond, which was approved by the Secretary of the Interior (R. 7–9).

On October 29, 1941, at a railroad crossing within the Fort Hall Indian Reservation a train operated by the Union Pacific Railroad Company, assignee of the Oregon Short Line, collided with a truck occupied by Frank Poewee, Ninip Toane, and Helen Toane, members of the Shoshone-Bannock Tribe of Indians, resulting in injuries to Frank Poewee and the deaths of Ninip and Helen Toane (R. 60–61, 98–99). The appellants refused to make any settlement therefor (R. 61), and on June 4, 1942, the United States instituted this suit under the authority of the Act of September 1, 1888, to recover damages in the amount of $10,000.00 for the killing or maiming of the Indians (R. 2–32).[1]

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[1] The complaint was in seven counts. The first count sought recovery of a total of $10,000.00 for the killing or maiming of the three Indians (R. 2–12). Each of the second, third, and fourth counts claimed damages in the amount of $10,000.00 for the killing or maiming of one of the Indians (R. 12–18). Similarly, each of the last three counts demanded judgment for $25,000.00 against the railroad companies and $10,000.00 against the surety (R. 18–32). When required to make an election of counts, the United States chose to proceed on the first four counts (R. 95). However, since the total of the awards did not exceed $10,000.00, the case may be treated as though only the first count had been filed.

The appellants answered, setting up as defenses (1) that recovery under the statute could not be had in the absence of negligence and (2) that the acts and omissions of the Indians were the sole proximate cause of the accident (R. 57–73). The United States moved to strike each of these defenses (R. 73–74). The court granted the motion to strike as to the first of these defenses, on the authority of *United States* v. *Oregon Short Line R. Co.*, 113 F. 2d 212 (C. C. A. 9, 1940), but denied it as to the second (R. 96–97).

The case was tried before a jury, and the material testimony established the circumstances of the accident to be as follows: Frank Poewee, accompanied by the other two Indians, was driving a truck loaded with long poles in a southerly direction on a highway parallel with the railroad track (R. 138, 153, 173). As he approached the crossing, he slowed down, shifted into first gear, and made a right turn to cross the railroad track, the speed of the truck being five miles an hour at this time (R. 138, 154–155). The distance from the track to the point where he made the right turn was about 27 feet (R. 154, 186). When the truck reached the nearest rail, Helen Toane cried out that a train was coming (R. 138, 188), and shortly thereafter, when the truck was in such position that the headlights were about in line with the farthest rail (R. 178) and the cab was on the track (R. 173), the motor stalled (R. 175, 179, 188) and Poewee could not get it started again (R. 188). The train was then about 200 yards

away, coming from the north at about 40 miles per hour, with whistle blowing and bell ringing (R. 172–173, 178–179). When the engineer saw the situation, he placed the brake in emergency (R. 174, 178), but the collision could not be avoided (R. 179). Both the engineer and brakeman testified to the effect that the truck could have crossed the tracks safely if it had not stalled (R. 173, 178).

With respect to the amount of damages recoverable for the deaths of Ninip and Helen Toane, the court adopted the theory that damages would be measured by the survivors' reasonable expectation of pecuniary benefits and the reasonable funeral expenses paid for by the estates. Accordingly, testimony as to loss of companionship (R. 122, 160–161) and funeral expenses paid by others (R. 108, 163–164, 166) was excluded. Helen Toane's mother, who was about 80 years old at the time of the accident (R. 106), testified that her daughter had given her money and food at various times (R. 121). She was unable to describe the contributions with exactness, but Helen gave her "maybe better than a hundred dollars" during her lifetime, was accustomed to buy her groceries worth about twenty dollars at intervals ranging from two weeks to two months, and sometimes bought her a shawl (R. 122–123). The mother, who had remarried, lived with her husband and before Helen's death earned some money sewing buckskin and received a pension from the Indian Agency (R. 123–124). Ninip Toane's father, who lived with a daughter, testified on direct examination that Ninip "contributed very little" (R. 170). He was not cross-examined (R. 171).

In order to lay a foundation for evidence of the amount of funeral expenses there was testimony that it was the custom at Indian funerals to provide food for the mourners and clothing for the deceased (R. 106–107) and that a reasonable amount to be spent for food, exclusive of meat, at similar funerals was $100.00 (R. 111). Then evidence was admitted that groceries to the value of $63.28 had been paid for from the estate of Ninip Toane (R. 112–113) and that a beef, owned by Ninip and valued at $90.00, had been consumed at the funeral (R. 162–163). Evidence as to the value of another beef, owned by another individual and not paid for by the estate, was excluded (R. 163–164), as was testimony as to the value of clothing furnished the decedents as gifts (R. 166).

At the close of the testimony, the appellants moved for a directed verdict on the ground that the sole proximate cause of the accident was the act of the driver in attempting to cross the railroad track (R. 189–190). This motion was denied (R. 190). The court then instructed the jury to the effect that the Act of September 1, 1888, imposed upon the appellants the duty of indemnifying the Indians for all damages resulting from the operation of the railroad independently of negligence and also losses occasioned by inevitable and unavoidable accident, the only exception to liability being where the acts of the Indians themselves were the proximate cause of the accident (R. 198–199). Proximate cause was defined as "a cause which in its natural and continuous sequence, unbroken by any new cause, pro-

duces an event, and without which the event would not have occurred" (R. 198). The jury was also instructed that damages for the deaths of Ninip and Helen Toane were "limited to the reasonable expectation of pecuniary benefits to particular individuals"; that if no individual was deprived of such expectation, no damages should be awarded; that there could be no recovery on account of grief, mental anguish, or loss of companionship; and that any award for funeral expenses must be limited to such expenses as were found to be reasonable and to have been paid or payable by the beneficiaries (R. 199–200). The court refused to give appellants' requested instructions defining the duty under Idaho law of a traveler upon a highway about to cross a railroad track (R. 212–213) and giving a specific illustration of the application of the instructions on proximate cause (R. 214).

The United States excepted to the instructions insofar as they permitted the defense of proximate cause and limited recovery of damages to the loss of pecuniary benefits and funeral expenses paid by the estate (R. 201–204). The appellants excepted to those parts of the instructions that permitted recovery independently of negligence and in cases of unavoidable accident (R. 205–206), and to the court's refusal to give requested instructions with respect to the duty of a traveler about to cross a railroad track and the example of the application of the definition of proximate cause (R. 208–209).

The jury returned a verdict fixing damages of $1,250.00 for the death of Ninip Toane, $1,250.00 for

the death of Helen Toane, and $2,000.00 for the injuries to Frank Poewee (R. 76). Judgment was entered on the verdict (R. 77–78). Thereafter the appellants filed a motion for judgment notwithstanding the verdict, or alternatively for a new trial (R. 78–82). The motion was denied on November 18, 1943 (R. 83), and this appeal followed (R. 83–84).

ARGUMENT

I

The Act of September 1, 1888, imposes absolute liability upon the railroad for damages accruing by reason of the killing or maiming of Indians in the course of the operation of the railroad

A. *The Act imposes liability independent of the railroad's negligence.*—Appellants' contention (Br. 40–50) that the Act of September 1, 1888, imposes no liability for payment of damages in the absence of any negligence on their part is answered by the decision in *United States* v. *Oregon Short Line R. Co.,* 113 F. 2d 212 (1940), where this Court held that freedom from negligence is immaterial in an action under the statute, and said (p. 214):

> In their popular sense, the words used reasonably import the broad purpose of saving the Indians harmless, or of insuring them against loss even though occasioned by inevitable accident.

On this appeal appellants have not assigned any reasons in support of their position which were not considered previously by this Court. It is submitted,

therefore, that the previous decision should stand as correct.

B. *That the proximate cause of the damages was the act of an Indian is no defense.*—The district court, although recognizing the ineptness of the defense of freedom from negligence, nevertheless held that appellants would not be liable for damages where the acts of the Indians themselves are the proximate cause of the injury (R. 96–97, 198–199). However, it is plain that the defense of proximate cause is invalid for the same reasons which negative the defense of freedom from negligence. It will be recalled that without any right to do so a railroad company (to which appellant railroads are successors) constructed a railroad across the Shoshone-Bannock Reservation, which the United States had guaranteed would remain in the peaceful and exclusive occupancy of the Indians. In order to alleviate the situation in which the company found itself, the United States and the Indians entered into an agreement for the grant of a right of way to the company. This agreement was ratified by Congress and a right of way granted to the company by the Act of September 1, 1888. Thus, the primitive Indians were faced with the threat of unfamiliar and formidable dangers. For the protection of the Indians, Congress, in section 14 of the statute, provided for the execution of a bond conditioned "for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes * * * in the construction or operation of said railway."

"From a consideration of the statute in its setting it is difficult to conclude otherwise than that Congress intended thereby to surround the Indians with a measure of protection consistent with the increased hazards to which the advent of the railroad subjected them." *United States* v. *Oregon Short Line R. Co.,* 113 F. 2d 212, 215–216 (C. C. A. 9, 1940). Whether a particular injury arose from the negligence of the railroad, unavoidable accident, or the negligence of the Indians themselves, the loss to the Indians would be the same. Since the construction and operation of the railroad caused the hazard of injuries to the Indians, including those proximately caused by the acts of the Indians themselves, and the statute requires payment of "any and all damages which may accrue * * * in the operation of said railway" without exception, it is plain that Congress intended the railroad rather than the aborigine to run the risk of all losses. Such an interpretation of the legislation is justified by the principle that statutes for the benefit of Indians are to be liberally construed, keeping in mind "the situation and needs of the Indians and the object to be attained" and resolving all doubts in favor of the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87, 89 (1918); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912). Furthermore, since the act is to be given effect as a law and a grant, it must be strictly construed against the grantee. *Hannibal etc. Railroad Co.* v. *Packet Co.,* 125 U. S. 260, 271, (1888). Therefore, it is clear that in return for

the privilege of operating the railroad the company was to compensate the Indians for damages which would not otherwise arise. As this Court said in *United States* v. *Oregon Short Line R. Co.,* 113 F. 2d 212, 216:

> We know of no reason * * * why Congress may not, as a condition of its grant of a right of way through an Indian reservation, impose upon a railroad company the full burden of losses to the tribal Indians and their property occasioned by the operation of trains within the borders of the reservation. Cases dealing with general statutes have no application.

II

The evidence supports a finding that the acts of the Indians were not the proximate cause of the collision

Appellants contend (Br. 20–27) that the proximate cause of the collision was the act of Poewee in negligently driving the truck onto the crossing. As shown, *supra,* pp. 10–12, that an injury was caused by the negligence of the Indians themselves would be no valid defense to an action under the 1888 Act. However, even if it were, appellants' contention must fail because it is not supported by the record.

The undisputed testimony was that as the truck was crossing the tracks the motor stalled (R. 175, 179, 188). The brakeman, who was riding in the cab of the locomotive, testified that "he had time to go across I think but he drove up and stopped with the cab right on the railroad track" (R. 173). And

the engineer stated, "I thought for a second or two that he was going over and when I saw that he didn't move I placed the brake in emergency" (R. 178). This testimony shows that the truck could have safely crossed the track if it had not stalled. It is to be inferred that on the basis of this testimony the jury found that the proximate cause of the collision was not that the Indians drove onto the crossing but that the truck's motor stalled. Thus, even if Poewee were negligent in driving upon the crossing, such negligence was not the proximate cause of the accident, but rather the stalling of the motor was an intervening cause which superseded any prior negligence as the proximate cause. *Central of Georgia Ry. Co.* v. *Faust,* 17 Ala. App. 96, 82 So. 36, 38 (1919), certiorari denied 203 Ala. 248, 82 So. 345; *Cottam* v. *Oregon Short Line R. Co.,* 55 Utah 330, 187 Pac. 827, 828 (1919). Cf. *Riess* v. *Pennsylvania R. Co.*, 107 F. 2d 385, 386 (C. C. A. 2, 1939); *Hull* v. *Seattle, R. & S. Ry. Co.,* 60 Wash. 162, 110 Pac. 804, 806 (1910). Accordingly, the collision must be charged to inevitable accident, for which there would be recovery under this Court's holding in *United States* v. *Oregon Short Line R. Co.,* 113 F. 2d 212.

Appellants have also assigned as error (Br. 27–33) the court's refusal to give certain requested instructions.[2] However, these instructions assumed as a fact

[2] Requested instruction No. 7 (R. 212–213) was as follows:

"You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the track. It is also the duty

that the proximate cause of the collision was the failure to take proper precautions before entering the crossing and did not take into account the uncontradicted testimony showing that the accident would not have occurred but for the stalling of the motor. Since the requested instructions singled out particular circumstances and ignored others which were material to the issue, the instructions would have been misleading to the jury and were properly rejected. *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 433 (1892); *Rio Grande W. Ry. Co.* v. *Leak*, 163 U. S. 280, 287–288 (1896); *Carpenter* v. *Connecticut General Life Ins. Co.*, 68 F. 2d 69, 73 (C. C. A. 10, 1933). Moreover, the charge was more favorable to appellants without the requested instructions, for from the charge as given the jury could have found that the proximate cause of the accident was the act of the Indian in entering the crossing whether or not the Indian was negligent in so doing.

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of the traveler to give way for the passage of trains, and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears."

Requested instruction No. 9 (R. 213–214) was as follows:

"Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching engine or train and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees."

III

The court properly admitted evidence as to funeral expenses

According to the weight of authority, recovery can be had for funeral expenses which have been paid or are payable by the beneficiaries, provided it appears that such expenses are reasonable in amount. *Jutila* v. *Frye,* 8 F. 2d 608, 609 (C. C. A. 9, 1925). Cf. *Hartman* v. *Gas Dome Oil Co.,* 50 Idaho 288, 295 Pac. 998, 999 (1931). And even in those cases in which funeral expenses have been excluded because recovery under the particular death statute was limited to loss of support, it has been indicated that the funeral expenses could be recovered in another action by the estate. *Philadelphia & R. Ry. Co.* v. *Marland,* 239 Fed. 1, 11 (C. C. A. 3, 1917); *Hoffman* v. *Reading Co.,* 12 F. Supp. 1010, 1011–1012 (N. J. 1935). Hence, when, as here, the statute provides for the recovery of "any and all damages," it is plain that there can be no objection to the recovery of funeral expenses and other items of damage in one proceeding. Since there was testimony that it was customary to furnish food to mourners at Indian funerals (R. 110) and that two beeves and $100.00 worth of groceries were a reasonable amount of food for a funeral of the size of the one in question (R. 110–111), the court was correct in admitting evidence that groceries to the value of $63.28, paid for from the estate of Ninip Toane (R. 113), and a beef worth $90.00, owned by Ninip (R. 163), were consumed at the funeral.

Appellants contend (Br. 38) that the testimony of Lizzie Pokibro was erroneously admitted because her estimate of $100.00 as to the value of food appears to include food furnished by volunteers. However, the record shows that when an employee of the Indian Agency had been asked what the agency records showed as having been expended for food consumed at the funeral, an objection was made, one of the grounds being that no proper foundation had been laid, and the following colloquy occurred (R. 108–109):

> The COURT. I don't think the proper foundation has been laid as to the reasonableness of the expenditures unless you intend to connect it up. I think that it should be shown that the amount of the expenditure was within the custom of the Indians. I think, however, in order to save time, I will allow this witness to answer.
>
> Mr. CASTERLIN. I will show that. I will have this witness step aside.

Lizzie Pokibro then took the stand and gave her estimate of $100.00, not including beef, in answer to the following question (R. 111):

> Q. Now, Lizzie, tell us what would be a reasonable amount for food for the number of people at the funeral, taking into consideration that the funeral lasted for four days?

Therefore, it is clear that Lizzie's testimony was not admitted for the purpose of proving any specific amount expended for food, but solely to lay a founda-

tion for establishing the reasonableness of the expenditures claimed.

IV

The evidence is sufficient to support the verdicts for the death of Ninip and Helen Toane

In federal courts a jury verdict for unliquidated damages will not be reversed on appeal unless it appears that the verdict is so excessive that it could have been reached only through passion and prejudice. *Southern Ry. Co.* v. *Bennett,* 233 U. S. 80, 86–87 (1914); *Western Gas Const. Co.* v. *Danner,* 97 Fed. 882, 890 (C. C. A. 9, 1899); *Arizona & N. M. Ry. Co.* v. *Clark,* 207 Fed. 817, 824 (C. C. A. 9, 1913); *Swift & Co.* v. *Ellinor,* 101 F. 2d, 131, 132 (C. C. A. 5, 1939); *American Ice Co.* v. *Moorehead,* 66 F. 2d 792, 794 (App. D. C. 1933). This is especially true in actions for death where "it is not possible to prove the damage with any approximation to certainty" and "the jury must estimate them as best they can by reasonable probabilities, based upon their sound judgment as to what would be just and proper under all of the circumstances." *Butler* v. *Townsend,* 50 Idaho 542, 298 Pac. 375, 376–377 (1931); *Southern Pac. Co.* v. *Lafferty,* 57 Fed. 536, 543–544 (C. C. A. 9, 1893); *Hopper* v. *Denver & R. G. R. Co.,* 155 Fed. 273, 277 (C. C. A. 8, 1907); *Hepp* v. *Ader,* 130 P. 2d 859 (Idaho, 1942). Cf. *Jutila* v. *Frye,* 8 F. 2d 608, 609 (C. C. A. 9, 1925). In view of the testimony in this case, it cannot reasonably be said that verdicts of $1,250.00 for the deaths of each of two Indians are excessive.

There was testimony that Helen Toane had contributed to the support of her aged mother. The mother was unable to describe the contributions with exactness, but her testimony justified a finding that Helen had given her more than $100.00 in cash, was accustomed to buy her groceries worth about $20.00 at intervals ranging from two weeks to two months, and occasionally bought articles of clothing (R. 122–123). If it be assumed that groceries worth $20.00 were given to the mother once a month, on an average, the contributions of food alone would be worth $240.00 a year to the mother. Thus, the award for the death of Helen Toane would replace the mother's pecuniary loss for a period of about five years. Appellants contend (Br. 36) that since the mother's life expectancy according to mortality tables was only 3.08 years, that is the greatest period for which the mother's pecuniary loss can be considered. However, even if mortality tables had been in evidence, they would not be conclusive. The jury saw the mother and was entitled to draw its own conclusions as to her life expectancy. Cf. *Philadelphia, B. & W. R. Co.* v. *Tucker,* 35 App. D. C. 123, 150–151 (1910); *Butler* v. *Townsend,* 50 Idaho 542, 298 Pac. 375, 377 (1931). Hence, it cannot properly be said that the evidence was insufficient to support a verdict of $1,250.00 for the death of Helen Toane.

As to Ninip Toane, there was evidence that his estate had furnished for the funeral groceries worth $63.28 (R. 113) and a beef worth $90.00 (R. 163). The payment of $122.50 to the undertaker from

Ninip's estate was also admitted[3] so that funeral expenses totalling $275.78 were paid from Ninip's estate. Therefore, the award for pecuniary loss to Ninip's father is less than $1,000.00. The only testimony as to contributions made by Ninip to his father was the father's statement that "he contributed very little" (R. 170). This testimony does indicate that he made some contributions, however small, and the jury, having seen and heard the witness, could derive a more definite meaning from the father's tone of voice and demeanor. Furthermore, an award of less than $1,000.00 for a death does not indicate a basis of any sizable contributions. And since the jury had the opportunity to estimate the life expectancy of the father and determine the period over which the pecuniary loss should be spread, the verdict cannot be regarded as excessive, especially when it has been affirmed by the court in denying the motion for judgment notwithstanding the verdict or for a new trial (R. 83). Cf. *Swift & Co.* v. *Ellinor,* 101 F. 2d 131, 132 (C. C. A. 5, 1939); *Butler* v. *Townsend,* 50 Idaho 542, 298 Pac. 375, 376–377 (1931).

[3] It was alleged in a Bill of Particulars filed in this case that $145.00 had been paid to an undertaker, $122.50 of which had been paid by Ninip's estate (R. 43). In their answer appellants denied that funeral expenses had been incurred in any sum in excess of $145.00 (R. 61), thus admitting the claim based upon payment to the undertaker. In the charge to the jury the court summarized the content of the answer (R. 195). Appellants must be considered to have again admitted the claim for the undertaker's bill by alleging in their motion for judgment notwithstanding the verdict that the total amount of funeral expenses did not exceed $500.00 (R. 79), when, exclusive of the undertaker's bill, the funeral expenses did not exceed $153.28.

Moreover, appellants have no just cause to complain of the size of the verdicts. While the court limited recovery "to the reasonable expectation of pecuniary benefits to particular individuals" (R. 199), this being the measure of damages under a majority of wrongful death statutes, many death statutes are more liberal in allowing recovery for conscious suffering, grief, loss of companionship, etc. For example, section 5–311 of the Idaho Code Annotated (1932) provides that in wrongful death actions "such damages may be given as under all the circumstances of the case may be just," and this section has been interpreted as permitting recovery for loss of companionship. *Hepp* v. *Ader,* 130 P. 2d 859 (Idaho, 1942). And many death statutes permit recovery for conscious suffering of the decedent. Cf. *St. Louis & Iron Mtn. Ry. Co.* v. *Craft,* 237 U. S. 648, 657–661 (1915); *Northern Pac. Ry. Co.* v. *Maerkl,* 198 Fed. 1, 7 (C. C. A. 9, 1912). Inasmuch as the statute herein involved provides for the "payment of any and all damages," the court below would have been justified in construing it liberally to permit recovery for loss of companionship, conscious suffering, and other items of damages. Although the court below excluded all testimony as to damages resulting from loss of companionship (R. 122, 160–161), there was testimony which indicated that Ninip Toane lived for some time after the accident (R. 139, 167–168). If the jury had been allowed to consider such testimony, the verdicts would probably have been greater than they were.

CONCLUSION

It is submitted, therefore, that the judgment appealed from should be affirmed.

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